IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

IN RE CAUSTIC SODA ANTITRUST LITIGATION	**ORAL ARGUMENT REQUESTED** Lead Case No. 1:19-cv-00385-EAW-MJR
THIS DOCUMENT RELATES TO: ALL ACTIONS	

DEFENDANT FORMOSA PLASTICS CORPORATION, U.S.A.'S SUPPLEMENTAL REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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Defendant Formosa Plastics Corporation, U.S.A. ("FPC USA") submits this supplemental reply memorandum of law in further support of its motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Consolidated Class Action Complaint ("Complaint") for failure to state a claim upon which relief can be granted as against FPC USA.

Preliminary Statement

Plaintiffs' opposition (the "Opposition" or "Opp.") advances a flawed and discredited theory of the federal antitrust laws under which circumstantial allegations of parallel conduct alone – without any compelling "plus factors" leading to a plausible inference that an agreement was made – is enough to state an antitrust claim against FPC USA, thereby subjecting it to years of costly and burdensome discovery. Like the Complaint, the Opposition struggles to identify factual allegations that even reference FPC USA – most of which are tacked on as afterthoughts to allegations against other Defendants – and, instead, simply hypothesizes that because FPC USA's involvement in the alleged conspiracy is *theoretically possible*, it must have occurred. That fails the pleading standard for antitrust actions in federal court. Stripped of its legal conclusions and rank speculation, the Opposition only highlights the Complaint's fatal deficiency: Plaintiffs fail to allege a plausible inference that FPC USA agreed to participate in any conspiracy to fix prices, restrain capacity, or allocate customers for caustic soda.

Put another way, under Plaintiffs' incorrect legal interpretation, a completely innocent, rational economic market participant acting unilaterally would have no means to avoid protracted antitrust litigation, if a plaintiff could merely characterize its activity, in wholly conclusory terms, as part of a circumstantial conspiracy. Here, for example, Plaintiffs allege that FPC USA announced caustic soda price increases following similar announcements by other competitors, as market conditions changed; Plaintiffs allege that FPC USA attended trade group meetings, but

do not allege that FPC USA had any discussions with any other competitor at those meetings, much less reached any agreement with any other competitor; and Plaintiffs allege that FPC USA shut down its caustic soda production from time to time for either regular maintenance or to repair damage caused by Hurricane Harvey. Common economic experience and common sense dictate that all of this alleged conduct is exactly what a rational market participant acting unilaterally would be expected do in these circumstances. Plaintiffs cannot seriously argue that FPC USA should never shut down its plant for mechanical repairs or natural disasters because that would restrict output in this market. Nor can they seriously argue that FPC USA should be prohibited from raising its prices when its competitors have announced price increases, because that might result in higher profits for FPC USA. Yet, Plaintiffs make those arguments to justify embroiling FPC USA in this action, so that they can take burdensome discovery of FPC USA in search of a viable claim.

Plaintiffs' allegations against FPC USA thus fail the *Iqbal-Twombly* standard, which was designed to remedy the precise evil of Plaintiffs' pleading approach here: "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). And there can be no plausible inference of conspiracy in the first place when the alleged conduct is fully consistent with rational business behavior. *See LLM Bar Exam, LLC v. Barbri, Inc.*, 271 F. Supp. 3d 547, 578 (S.D.N.Y. 2017) (courts will not infer conspiracy on the pleadings when "there are obvious alternative explanations for the facts alleged"). Even "viewed as a whole," FPC USA's conduct does not violate the Sherman Act; one would be hard pressed to find a manufacturer that does not periodically raise prices, participate in trade associations and, from time to time, temporarily

shutter a plant to perform maintenance (let alone in response to hurricane damage). Unless the Court is willing to subject all such entities to discovery, it should dismiss FPC USA from this action as the *Iqbal-Twombly* standard requires.

Argument

I. THE COMPLAINT FAILS TO ALLEGE PARALLEL CONDUCT BY FPC USA THAT IS SUGGESTIVE OF CONSPIRACY

FPC USA's opening brief demonstrated that Plaintiffs' allegations regarding (i) price increases, (ii) trade association meetings, (iii) "temporary shutdowns" due to plant maintenance and Hurricane Harvey, and (iv) co-producer supply agreements, each fail to raise a plausible inference of conspiracy as opposed to "merely parallel conduct that could just as well be independent action." (*See* FPC USA's Br. (ECF 84-1) at 4 (citing *City Council of Baltimore v. Citigroup, Inc.*, 709 F.3d 129, 137 (2d Cir. 2013)).) In response, Plaintiffs do not dispute that FPC USA's conduct in these categories is consistent with unilateral action or rational and pro-competitive business strategy. Rather, Plaintiffs suggest that FPC USA's "conduct that standing alone may appear to be lawful nonetheless *may* provide support—along with other factual allegations, viewed as a whole—for finding the plausibility of a Sherman Act violation." (Opp. at 60 (emphasis added).)

A. Plaintiffs' Allegations Specific to FPC USA Do Not Support a Plausible Inference That It Agreed to Participate in a Conspiracy

Plaintiffs concede that they do not plead direct evidence of a conspiracy (because they have none), and instead pin their antitrust claims on allegations of parallel conduct purporting to "strongly show that the conspiracy allegation against [FPC USA] is plausible." (Opp. at 60.) But, as set forth in Defendants' opening briefs, Plaintiffs must allege "plus factors" with respect to FPC USA that, viewed in conjunction with the parallel conduct, "permit a factfinder to infer a conspiracy." *Anderson News, L.L.C. v. Am. Media, Inc.*, 899 F.3d 87, 104 (2d Cir. 2018), *cert.*

denied, 139 S. Ct. 1375 (2019). (*See* Defs.' Joint Br. (ECF 79-1) at 10; FPC USA's Br. at 4.) Plaintiffs' failure to plead either direct evidence of conspiracy or parallel conduct combined with plus factors suggestive of conspiracy—the "basic building block[s] of an antitrust conspiracy"—therefore requires dismissal of their claims. *See Barbri*, 271 F. Supp. 3d at 579; *see also In re Interest Rate Swaps Antitrust Litig.*, 261 F. Supp. 3d 430, 464-65 (S.D.N.Y. 2017) (dismissing antitrust claims based on limited "shards" of parallel conduct).

But even if a plaintiff can allege both parallel conduct and "plus factors," this still may "not support a Section 1 claim." *Barbri*, 271 F. Supp. 3d at 578. "An inference of conspiracy will not arise when the conspirators' parallel conduct made perfect business sense, there are obvious alternative explanations for the facts alleged, or the alleged facts suggest competition at least as plausibly as they suggest anticompetitive conspiracy." *Id.* (internal quotation marks and alterations omitted). The "determination of whether a complaint states a plausible claim for relief will be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Rochester Drug Co-op., Inc. v. Biogen Idec U.S. Corp.*, 130 F. Supp. 3d 764, 769 (W.D.N.Y. 2015) (Wolford, J.) (quoting *Twombly*, 550 U.S. at 679) (internal quotation marks and alterations omitted).

Plaintiffs cannot overcome FPC USA's motion to dismiss by alleging conduct that is equally consistent with unilateral or parallel conduct, because that would "risk propelling defendants into expensive antitrust discovery on the basis of acts that could just as easily turn out to have been rational business behavior as they could a proscribed antitrust conspiracy." *Citigroup*, 709 F.3d at 137.

The Opposition attempts to rely on the four purported "plus factors" already addressed and debunked in FPC USA's opening brief: that FPC USA (1) increased its prices for caustic

soda in line with other Defendants; (2) attended industry meetings around the time of the price increases; (3) decreased its caustic soda production capacity; and (4) entered into co-producer supply agreements with other Defendants. (*See* Opp. at 59-62.) Like the parallel conduct at issue in *Twombly*, these allegations are "just as much in line with a wide swath of rational and competitive business strategy" as they are with an unlawful agreement. 550 U.S. at 554; *see also Barbri*, 271 F. Supp. 3d at 578. None of these purported "plus factors" support a claim against FPC USA.

1. The Complaint's Allegations of Price Increases Against FPC USA Do Not Support an Inference of Conspiracy

Plaintiffs concede, as they must, that "[a] unilateral announcement of a price increase by a competitor in a market behaving competitively is not unlawful." (Opp. at 60.) Consistent with this well-established maxim, FPC USA demonstrated that its unilateral price increase announcements were neither uniform nor simultaneous with respect to the price increase announcements of other Defendants, and are therefore more consistent with rational pricing in a concentrated industry than with a conspiracy to fix prices. (*See* FPC USA's Br. at 5-6.) *See Barbri*, 271 F. Supp. 3d at 578 ("An inference of conspiracy will not arise when the conspirators' parallel conduct 'made perfect business sense'").

Plaintiffs attempt to bolster their allegations of parallel conduct against FPC USA by arguing that its price increase announcements, following those of other Defendants, are "strongly suggestive of a sudden pivot which implies prior knowledge as well as coordination" (Opp. at 21-22, citing Complaint ¶¶ 54, 58, 65, 70-72, 74), and that "other Defendants acted 'similarly' and in concert with respect to [FPC USA]'s price increase announcements, both in amount and timing," (Opp. at 60, citations omitted.) But these conclusory inferences are mere hypotheticals that assume an agreement and ignore *Twombly*'s requirement that allegations of "parallel

conduct and a bare assertion of conspiracy will not suffice" to state a claim for violation of Section 1 of the Sherman Act. 550 U.S. at 556-57; *see also Rochester Drug*, 130 F. Supp. 3d at 774 ("[T]he Court need not accept as true Plaintiff's conclusory allegation that Defendant . . . 'must have' entered into an agreement or arrangement . . . ."). Simply put, FPC USA's alleged price increases are fully consistent with rational business behavior, *see Barbri*, 271 F.Supp.3d at 578, and do not support an inference of conspiracy.[1]

Plaintiffs appear to suggest that the financials of Defendant Formosa Plastics Corporation ("FPC"), which owns a minority stake in FPC USA, are relevant to whether FPC USA conspired with other Defendants to raise prices. (*See* Opp. 3-4, 11, citing Compl. ¶ 83, alleging that FPC's consolidated operating profit increased 68.5% from 2016 to 2017.) But the Complaint contains no allegations regarding either FPC's or FPC USA's margins or profitability with respect to caustic soda, or the effect of caustic soda prices on FPC's or FPC USA's overall financials. Plaintiffs' reference to FPC's "operating profit" is meaningless in the absence of any allegations as to the impact of FPC USA's alleged caustic soda price increase announcements.

2. FPC USA's Involvement with Industry Associations Does Not Support an Inference of Conspiracy

Plaintiffs do not dispute that membership in industry associations and participation in industry association meetings are insufficient to show the plausibility of their conspiracy allegations, as required by *Twombly*. (*See* Opp. at 61.) However, Plaintiffs contend that they plausibly allege a conspiracy with allegations that industry meetings occurred around the times

[1] Plaintiffs' argument that FPC USA's alleged price increase announcements were effective "despite the existence of excess capacity, flat demand, and flat or declining costs," (Opp. at 60), is wholly unsupported by the Complaint. There is not a single allegation in the Complaint that FPC USA suffered from excess capacity, flat demand, and flat or declining costs. Without such, the Complaint does not support an inference that FPC USA's alleged price increase announcements are suggestive of a conspiracy.

that "Defendants were in process of increasing prices to their U.S. customers." (*Id.*, citation omitted.)

Notably, both the Complaint and the Opposition fail to tie FPC USA to a single industry association meeting, or to link any single price increase to a period during or directly after an industry association meeting. Rather, the Complaint vaguely alleges only that industry meetings occurred around the same time as price increases. (*See, e.g.,* Compl. ¶ 93 ("the Vinyl Institute's annual meetings took place in November 2015 and 2017, and in September 2016, when the Defendants were increasing U.S. prices"); *id.* ¶ 92 ("Defendants have been increasing U.S. prices during most of the months in which" meetings took place).)[2]

Plaintiffs' failure to allege that employees or representatives of FPC USA attended any specific meeting – let alone a meeting that coincided with a price increase *by FPC USA* in a way that might raise an inference of conspiratorial interfirm communications – demonstrates that these industry meeting allegations do not support an inference of conspiracy as against FPC USA.[3]

[2] Given the vague nature of the allegations in the Complaint, it is no surprise that the Opposition is similarly vague. (*See*, *e.g.*, Opp. at 37 (Industry meetings "coincided throughout the Class Period with the months in which Defendants were implementing quarterly price increases.").)

[3] Plaintiffs' reference in the Opposition to a report purporting to state that "Chlor-Alkali producers [including Westlake and FPC USA] seemed to all be on the same page" at an American Fuel & Petrochemical Manufacturers meeting (*see* Opp. at 42) is not supported by the Complaint. The Complaint does not refer to FPC USA as attending the meeting or being on the "same page" as any other Defendant, and therefore cannot support any inferences with respect to FPC USA. (*See* Compl. ¶ 124.) Even if the statement did refer to FPC USA, it says nothing about FPC USA's views on pricing or any interfirm communications involving FPC USA.

3. Plaintiffs' Allegations of Decreasing Production Capacity Do Not Support an Inference of Conspiracy

The Opposition, like the Complaint, fails to raise an inference that any reduction of production capacity by FPC USA is suggestive of a conspiracy. Plaintiffs imply that they satisfy their burden of plausibility as against FPC USA by alleging that "Defendants in a coordinated fashion . . . began to idle or shut down (or 'rationalize') hundreds of thousands of tons of capacity." (Opp. at 61.) But this is just the type of conclusory allegation that *Twombly* prohibits. Notably, Plaintiffs do not allege in the Complaint (or explain in the Opposition) how FPC USA "coordinated" with any other Defendant.

Indeed, the Complaint's allegations regarding production capacity against FPC USA, (*see id.* at 61-62), show that any reduction of that capacity was temporary and done only for legitimate reasons. Plaintiffs cite to paragraph 48 of the Complaint, which alleges that "maintenance issues may even have reduced capacity by as much as 10% in the fourth quarter of 2016 alone." Similarly, Plaintiffs cite to paragraph 50 of the Complaint, which alleges that Hurricane Harvey "disrupt[ed] over one-third of domestic capacity for a brief time." But the courts recognize that "common economic experience, and simple common sense" dictate that these alleged maintenance shutdowns support an inference that FPC USA acted as any rationale producer would, and certainly not against its self-interest. *Rochester Drug*, 130 F. Supp. 3d at 774. *See also Barbri*, 271 F. Supp. 3d at 578 (finding no inference of conspiracy where "there are obvious alternative explanations for the facts alleged").

4. Plaintiffs' Allegations of Co-Producer Supply Agreements Do Not Support an Inference of Conspiracy

The Opposition all but concedes that the Complaint contains no allegations against FPC USA with respect to co-producer agreements, suggesting instead that the Complaint "alleges far more than just co-producer transactions." (Opp. at 62.) The one paragraph of the Complaint that

Plaintiffs cite against FPC USA in this regard (¶ 94) does not identify a single co-producer agreement that FPC USA is alleged to have entered into, or any other agreements entered into by FPC USA. That paragraph alleges that "Defendant Olin . . . supplies *one or more of the other Defendants or their affiliates* with" precursor chemicals used to manufacture PVC. (*Id.* (emphasis added).) But the Complaint does not actually allege that FPC USA purchases anything from any other Defendant.

B. The Opposition Compounds the Complaint's Reliance on Group Pleading

Given Plaintiffs' failure to plausibly allege any conduct suggesting that FPC USA entered into a conspiracy, Plaintiffs resort to improper reliance on group-pleading allegations throughout the Opposition. Notably, the Complaint does not contain a single allegation regarding any communication between FPC USA and a customer, any price at which FPC USA actually sold caustic soda, or any refusal to deal with a customer.

Plaintiffs defend their group pleading as to FPC USA by suggesting that the Complaint "alleges each Defendant's participation in the unlawful conspiracy separately, while elsewhere referring to their collective actions." (Opp. at 41 & n.29, 60.) This is wrong. The Complaint does not allege anything "separately" as to FPC USA. For example, Plaintiffs claim that the Complaint includes a specific allegation that FPC USA participated in the conspiracy when it "agreed upon 'temporary shutdowns for plant maintenance and outages throughout 2016.'" (Opp. at 42, citing Compl. ¶¶ 48-49.) But the Complaint does not allege that FPC USA "agreed" to anything, only that "[t]here were also temporary shutdowns for plant maintenance and outages throughout 2016, including by defendants Olin, OxyChem, [FPC USA], and Westlake" and that "both planned and unplanned outages purportedly occurred at . . . [FPC USA]'s Point Comfort, Texas, plant". (Compl. ¶¶ 48-49.) The Opposition similarly misquotes the Complaint when it claims that there is an allegation that FPC USA "was 'on the same page' as the other producers

regarding pricing" (Opp. at 42, citing Compl. ¶ 124); the Complaint actually quotes an unidentified report that does not reference FPC USA at all. (*See* Compl. ¶ 124.) "It is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss." *Jordan v. Chase Manhattan Bank*, 91 F. Supp. 3d 491, 500 (S.D.N.Y. 2015) (alteration omitted). Notwithstanding Plaintiffs' vain attempt to rewrite the generalized allegations in the Complaint, the Complaint does not support any inference that FPC USA "participated in the alleged conspiracy." *Hinds Cty. v. Wachovia Bank N.A.*, 620 F. Supp. 2d 499, 513 (S.D.N.Y. 2009).

Conclusion

For the foregoing reasons, and those set forth in the Defendants' moving memoranda, the Court should dismiss the Complaint as against FPC USA with prejudice.

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Respectfully submitted,

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